F. DUANE BLAKE ET AL.
v.
BUREAU OF LAND MANAGEMENT
(ON RECONSIDERATION)

IBLA 96-155R Decided March 14, 2002

Reconsideration of F. Duane Blake et al. v. Bureau of Land Management, 145 IBLA 154 (1998), affirming an order issued by Administrative Law Judge James H. Heffernan dismissing grazing appeals for lack of jurisdiction. AZ-010-95-01 through AZ-010-95-13.

Reconsideration granted, decision reaffirmed.

1. Administrative Practice--Administrative Procedure: Administrative Review--Appeals: Jurisdiction--Board of Land Appeals--Delegation of Authority-- Endangered Species Act of 1973: Generally-- Endangered Species Act of 1973: Section 7: Consultation--Fish and Wildlife Service--Office of Hearings and Appeals--Rules of Practice: Appeals: Jurisdiction

   Issuance of a Fish and Wildlife Service biological opinion pursuant to section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536 (1994), does not deprive an administrative law judge or this Board of jurisdiction to act upon a grazing appeal filed under the Taylor Grazing Act, as amended, 43 U.S.C. § 315 (1994), with respect to issues not within the scope of the biological opinion.

2. Federal Land Policy and Management Act of 1976: Grazing Leases and Permits--Grazing and Grazing Lands--Grazing Permits and Licenses: Cancellation or Reduction

   BLM is required by the Taylor Grazing Act, as amended, 43 U.S.C. § 315 (1994), to serve a copy of a proposed action on any applicant or permittee who is affected by the proposed action. Serving a copy of the proposed decision affords the opportunity to submit relevant scientific data regarding the effects of the proposed action and to propose alternative action and mitigating measures that could have a direct bearing upon any subsequent FWS

> analysis. This process allows BLM to fulfill the statutory mandate under the Grazing Act, to allow notice and opportunity for hearing and review. At the same time it fulfills the mandates of the ESA that the proposing agency compile and submit the best available scientific data describing the effects of the proposed action.

APPEARANCES: Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management; Jeffrey B. Teichert, Esq., Cheyenne, Wyoming, for appellants,
F. Duane Blake, et al.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The Bureau of Land Management (BLM) seeks limited reconsideration of this Board's decision in F. Duane Blake et al. v. Bureau of Land Management, 145 IBLA 154 (1998). In that decision we affirmed a decision by Administrative Law Judge James H. Heffernan dismissing appeals of 13 Area Manager grazing decisions filed pursuant to 43 CFR 4160.4 and 4.470. Judge Heffernan dismissed those appeals for lack of jurisdiction based on the jurisdictional limitations contained in memoranda issued by the Secretary of the Interior on January 8 and April 20, 1993. BLM has asked the Board to reconsider its decision.

The January 8, 1993, Secretarial Memorandum provides in relevant part that

> OHA has no authority under existing delegations to review the merits of [Fish & Wildlife Service (FWS)] biological opinions. Any review of biological opinions would necessarily be limited to the federal district courts pursuant to Section 11(g) of the ESA.
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> This memorandum does not affect the discretion of Departmental bureaus on how to best implement a biological opinion from the FWS. Consistent with case law and the Section 7 regulations, the action agency determines how to implement the opinion, giving due deference to the biological findings of the FWS. The issue is whether OHA, instead of limiting its review to the merits of the BLM decision, should be allowed to look behind that decision and review the merits of the FWS biological opinion. When BLM decides to implement a reasonable and prudent alternative set out in a biological opinion, or if it decides to implement the mandatory terms and conditions of an incidental take statement attached to that opinion, OHA is not authorized to "second-guess" the biological opinion or findings of FWS when reviewing BLM's decision to adopt the measures prescribed in that opinion or advice. As stated above, OHA has not been delegated the authority to carry out such a review.

The April 20, 1993, memorandum reaffirmed the jurisdictional limitation, stating that

> if [BLM] decides to implement a reasonable and prudent alternative set forth in a FWS biological opinion, or if BLM implements the mandatory terms of a biological opinion, OHA is not entitled to "second-guess" the FWS findings in the guise of reviewing the BLM decision. Any review of FWS biological opinions is limited to the federal courts pursuant to the review mechanism created by Congress in section 11(g) of the [ESA]. 16 U.S.C. section 1540(g) [(1994)].

[1] In Blake v. BLM, supra, we held that issuance of a Fish and Wildlife Service biological opinion pursuant to section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536 (1994), does not deprive an Administrative Law Judge or this Board of jurisdiction to act upon a grazing appeal filed under the Taylor Grazing Act (Taylor Grazing Act), as amended, 43 U.S.C. §§ 315 - 315r (1994), with respect to issues not within the scope of the biological opinion. It was specifically noted that a determination regarding whether the Office of Hearings and Appeals has jurisdiction under the Taylor Grazing Act is not within the scope of a biological opinion. BLM does not dispute this holding.

The Area Manager's decisions underlying the appeals canceled and reissued grazing permits administered under the Taylor Grazing Act to include mandatory terms and conditions set out in the incidental take statement contained in a FWS Biological Opinion. On appeal the Appellants conceded that the terms and conditions incorporated in the new permits mirrored the mandatory terms and conditions set out in the incidental take statement. We held that the Appellants had raised no issues ancillary to those resolved in the FWS Biological Opinion and incidental take statement, and that Judge Heffernan properly dismissed the appeals for lack of jurisdiction. Blake v. BLM, supra at 162. BLM does not dispute this holding.

In our decision we noted that the ESA directs all Federal agencies to consult with FWS to insure that the agency's action is not likely to jeopardize the continued existence of any threatened or endangered species, or result in the adverse modification of its critical habitat. 16 U.S.C. § 1536(a)(2) (1994). We found it especially important that, under the ESA, the proposing agency is not just responsible for developing the proposed action and deciding upon its nature. It must also compile and submit the best available scientific data describing the effects of the action it intends to take on the listed species and prepare a biological evaluation of the proposed action. 50 CFR 402.14(d).

[2] We also noted that under the Taylor Grazing Act, when BLM proposes to take action, it must seek input from affected permittees and lessees and the interested public. After receipt of this input, BLM must submit a proposed decision to the affected permittees and lessees. This proposed decision is to set forth any action which would change the terms and conditions of a Taylor Grazing Act permit or lease, and the affected permittees and lessees are to be given an opportunity to protest. If a protest is filed, the authorized officer must reconsider the proposed decision in light of the protestant's statement of reasons and other information pertinent to the case. After review of the protest, the authorized

officer must then serve the final decision on the protestant and the interested public to afford opportunity for appeal, as provided in
43 CFR 4160.3.

The underlying facts of this case are set out in Blake v. BLM, supra, and need not be restated.

The focus of BLM's arguments in support of reconsideration is on compliance with the ESA, the need for which is undisputed. The language in the Blake decision to which BLM objects addresses BLM's obligation to fulfill the requirements of the Taylor Grazing Act as well as the ESA. BLM has asked the Board to reconsider this portion of the Board's decision. BLM's position before the Board constitutes extraordinary circumstances sufficient to justify granting the Petition. See 43 CFR 4.413. We have reviewed BLM's Petition and additional submissions of the parties and we reaffirm our earlier decision for the reasons stated below.

In support of its petition for reconsideration, BLM asserts that according a right of administrative appeal during the process leading to biological evaluation would preclude timely agency compliance with the ESA under 50 CFR 402.12(i). (Motion at 1-2.) BLM also objects to the Board's holding that, in the process of developing a proposed Federal action under the Taylor Grazing Act, for submittal to the FWS for biological evaluation pursuant to the ESA, BLM must seek input from affected permittees and lessees and the interested public. BLM contends that to provide permittees and lessees and the interested public a proposed decision and opportunity to comment and protest, followed by an appealable final decision, would be unduly burdensome and costly for the agency.

Respondent replies, inter alia, that the ESA itself takes many factors into account, and emphasizes that the U.S. Supreme Court, in
Bennett v. Spear, 520 U.S. 154, 176-177 (1997), considered that the agencies' "requirement to use the best scientific and commercial data available" was designed to protect a permittee against overzealous environmental restriction and "to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." (Reply Brief at 7.)

The Board concluded that the requirement that the authorized officer must serve its decision on the protestant and the interested public and afford opportunity for appeal, 145 IBLA at 162-66, was based upon the Departmental regulations themselves. The relevant regulations governing grazing administration at 43 CFR Subpart 4160 provide for administrative review as follows:

> (a) Proposed decisions shall be served on any affected applicant, permittee or lessee . . . who is affected by the proposed actions, terms or conditions, or modifications relating to applications, permits and agreements. . . .

(b) Proposed decisions shall state the reasons for the action and shall reference the pertinent terms, conditions and the provisions of applicable regulations. . . .

(c) The authorized officer may elect not to issue a proposed decision prior to a final decision where the authorized officer has made a determination in accordance with § 4110.3-3(b) or § 4150.2(d).

43 CFR 4160.1 (Emphasis added.)

Thus, proposed decisions must be served on any permittee who is "affected" by the proposed actions, terms or conditions, or modifications relating to the permit. 43 CFR 4160.1(a); see Joel Stamatakis, 98 IBLA 4, 7 (1987); Jones & Sandy Livestock, Inc., 75 IBLA 40, 42-43 (1983). A proposed decision shall set forth the reasons for the action and reference the relevant terms, conditions, and regulations. 43 CFR 4160.1(b).

Then, pursuant to 43 CFR 4160.2, any applicant, permittee, lessee or interested member of the public may protest the proposed decision within 15 days of receipt. If a protest is timely filed, BLM shall reconsider its decision in light of the protest and shall issue a final decision.
43 CFR 4160.3(b). Any person whose interest is adversely affected by a final decision may file an appeal to obtain a hearing before an administrative law judge. 43 CFR 4160.4; 43 CFR 4.470. The right of appeal to an administrative law judge for a hearing is grounded in section 9 of the Taylor Grazing Act dealing with grazing administration which directs the Secretary of the Interior to "provide by appropriate rules and regulations for local hearings on appeals from the decisions of the administrative officer." 43 U.S.C. § 315h (1994). The right to a hearing on appeal from decisions of the authorized officer made in the administration of grazing districts has been recognized by the courts. William N. Brailsford, 140 IBLA 57, 59 (1997); Animal Protection Institute of America, 120 IBLA 342, 344 (1991); see LaRue v. Udall, 324 F.2d 428, 432 (D.C. Cir.), cert. denied, 376 U.S. 907 (1964); Esperanza Grazing Association, 154 IBLA 47, 54 (2000); Joel Stamatakis, 98 IBLA at 7-8.

In this case, when BLM initiated consultation with the FWS, pursuant to section 7 of the ESA, the FWS biological opinion was requested but not yet prepared. There is no question that BLM had determined to pursue a specific course of action, as that course of action was articulated in its Biological Evaluation.

BLM is obligated by law to consult with FWS. It is equally obligated by law to consult with the grazing permittees. Departmental regulations promulgated pursuant to the Taylor Grazing Act provide for consultation, cooperation, and coordination with affected permittees prior to issuing grazing decisions to reduce permitted use. 43 CFR 4110.3-3(a).

Adjudication of grazing privileges in a manner consistent with both the Taylor Grazing Act and the ESA requires recognition that grazing is an “ongoing activity” pursuant to existing permits as distinguished from an application for a new activity. Various circumstances such as discovery of

listed species previously unknown within the impact area or a revised understanding of the impact of an action on listed species may generate a need for initial or further consultation with FWS regarding potential impacts to listed species. See Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1053-55 (9th Cir. 1994), cert. denied, 514 U.S. 1082; Sierra Club, 156 IBLA 144, 168 (2002). At the same time, proposed changes to ongoing grazing actions authorized by a permit issued pursuant to the Taylor Grazing Act must be implemented in compliance with the terms of that statute and the regulations promulgated thereunder. Construing the ESA in a manner which violates provisions of the Taylor Grazing Act and its implementing regulations would breach the fundamental concept of statutory construction that a subsequent statute will not be construed to impliedly repeal existing statutory authority in the absence of an expressed intent to repeal prior statutes. Kenneth F. Cummings, 62 IBLA 206, 209 (1982), 1/ quoting, 1 A Sutherland Statutory Construction, §§ 22.30, 23.10 (4th ed. 1972); Peabody Coal Co., 4 IBLA 303, 305 (1972).

Our decision in this case neither preempts nor interferes with the role of FWS in reviewing BA's (or BE's), issuing BO's, and issuing incidental take statements. Rather, our decision recognizes the requirement that BLM adhere to its obligation under the Taylor Grazing Act to consult with and obtain input from grazing permittees regarding proposed changes to grazing permit authorizations. In this regard, we must reject BLM's contention that its decision as to the terms under which grazing would be authorized in the new permits was interlocutory rather than an appealable decision. While the terms of the grazing authorization were subject to FWS concurrence in accordance with the ESA, the BLM decision was contained in the proposed decision/BE submitted to FWS.

Suggestions by BLM on reconsideration that adherence to the Taylor Grazing Act regulations itself threatens violation of the ESA pending any appeal and hearing are unfounded. The grazing regulations provide that when the authorized officer finds that continued grazing use "poses an imminent likelihood of significant resource damage," he may (after a reasonable effort at consultation with the affected permittees) close allotments or portions thereof to grazing or modify authorized grazing use by decision made effective upon issuance. 43 CFR 4110.3-3(b); see Lundgren v. BLM, 126 IBLA 238, 248 n.13 (1993).

As noted in detail above, BLM is required by the Taylor Grazing Act to serve a copy of its proposed action on any applicant or permittee who is affected by the proposed action. Serving a copy of the decision stating the action it proposes to submit to FWS for a biological opinion on the applicants and permittees who would be affected allows them the opportunity to submit relevant scientific data regarding the effects of the action the proposing agency intends to take and to propose alternative action and mitigating measures that could have a direct bearing upon any subsequent FWS analysis. 2/ This process allows BLM to fulfill its statutory mandate

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1/ Overruled on other grounds, Douglas H. Willson, 86 IBLA 135, 92 I.D. 153 (1985).

2/ The importance of mitigating measures was addressed in Blake v. BLM, supra, at 164. It could well be that mitigating measures agreed upon

to allow notice and opportunity for hearing and review under the Taylor Grazing Act. At the same time, it also fulfills the mandates of the ESA that the proposing agency is to compile and submit the best available scientific data describing the effects of the action the proposing agency intends to take. 3/ It allows affected parties the opportunity to be heard, submit relevant evidence and file objections to a proposed BLM grazing action prior to formal consultation with FWS. The Board's decision in Blake, supra, addressed the need to undertake this process, which is mandated by the statutes and regulations, and allows participation, submittal of evidence, consideration of alternatives and mitigation measures, and an appeals process. We find no basis for ignoring laws and duly promulgated regulations merely because the agency believes that it would be unduly burdensome and costly to abide by them.

The Board recognizes that there could be agency inconvenience inherent in issuance of a proposed decision pursuant to 43 CFR 4160.1(a), but it is the Taylor Grazing Act, not the decisions of this Board, which provides the right to notice an opportunity for a hearing. This regulation allows the Department to construe the ESA and the Taylor Grazing Act in pari materia.

In view of the issuance of a decision in this case, the petition for stay is denied as moot.

To the extent not addressed herein, the parties' arguments have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Petition for Reconsideration is granted and our Decision in Blake v. BLM, supra, is reaffirmed.

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R.W. Mullen
Administrative Judge

I concur:

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C. Randall Grant, Jr.
Administrative Judge

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fn. 2 (continued)
during consultation may result in the reduction of impact to a point that it would not be necessary to seek a biological opinion. See discussion of mitigating measures developed during the course of preparing a biological assessment in Oregon Natural Resources Council, 131 IBLA 180 (1994).
3/ We note that regulations promulgated pursuant to the ESA call for the involvement of applicants and prospective applicants to the greatest extent possible. 50 CFR 402.10(c) and 50 CFR 402.11(b). Current permit holders deserve no less, and the rare and endangered species deserve the full involvement of those who are familiar with their habitat.